APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 437-59

(Decided April 17, 1964)

AIR TERMINAL SERVICES INC. v. THE UNITED STATES

Benjamin W. Dulany for plaintiff. *Douglas, Obear & Campbell,* of counsel.

Edwin J. Reis, with whom was *Assistant Attorney General John W. Douglas* for defendant.

Before JONES, *Chief Judge,* WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges.*

OPINION

DURFEE, *Judge,* delivered the opinion of the court:

Plaintiff, a corporation engaged in the operation of concessions at various airports, entered into a contract on October 6, 1957 with defendant, by which plaintiff was granted a concession to operate an automobile parking business at the Washington National Airport. This airport was operated by defendant through its agency, the Civil Aeronautics Administration.

Plaintiff brought this suit to recover damages alleging that defendant breached the contract by installing, without plaintiff's consent, a number of parking meters on streets of the airport; thereby breaching an implied warranty not

to substantially alter the pre-existing factual basis under which plaintiff entered into the contract.

Defendant's Invitation to Bid stated in part:

> • • • The government will furnish to the concessionaire the ground space known as Areas 1, 6, 7, 8 and Official, as shown on Exhibit No. 1 attached to the Form of Agreement.

Exhibit No. 1 was a map of the airport showing, among other things, the specific location of the numbered and described parking areas, and also the location of certain employee parking areas. At this time Areas 1, 6, 7 and 8 were the only parking places (other than 62 metered spaces) that were available to the general public for the parking of automobiles.

The aforesaid invitation was accompanied by a "Data Sheet," a copy of the proposed agreement, and a form upon which to submit proposals. The Data Sheet read as follows:

AUTOMOBILE PARKING CONCESSION DATA SHEET

Effective date to begin operation—October 6, 1957

Location:

Parking Areas 1, 6, 7, 8 and official area (see Exhibit 1 attached to proposed agreement)
Normal Capacity:

Area	*Number of Automobiles*
6, 7, and 8	475
1	400
Official	20

Existing Rates—25 cents for three hours or a portion thereof

Gross Receipts—12 month period ending 5/31/57—$341,780

Existing monthly utility charges paid by concessionaire—$53.85

Past parking lot activity: A one week sampling indicates the average number of cars entering the parking lot daily to be as follows:

November	1956	1,248
January	1957	1,041
April	1957	1,491
July	1957	1,887

Total airline passengers enplaned and deplaned (by fiscal year ending June 30):

Actual	*Estimated*	
1956	*1957*	*1958*
3,815,418	4,201,199	4,500,000

The Data Sheet also described the existing method of operation, and allowed plaintiff to submit alternate proposals for other methods. The form for submission of proposals, as amended, stated required minimum guarantee to the Government of not less than $225,000 annually for further use of all specified areas. Plaintiff submitted a rental bid to be computed on a specified percentage of gross receipts, with a guaranteed annual minimum rental of $300,000, and a contract was entered into in substantial conformity with the invitation to bid and the bid, dated October 6, 1957.

Plaintiff commenced operation of the parking lots on October 6, 1957 under a type of operation approved by defendant. The parking time of each automobile was stamped on tickets, and the parking fees computed by an attendant when the automobile left the parking lot, based on the length of parking time.

Since at least 1952, defendant's representatives had given periodic consideration to various plans for reconstruction of the street areas and traffic circle in front of the Terminal Building at the Airport. Increasing traffic congestion and illegal parking in this area were a serious problem. Also, the airport authorities were of the opinion that there was a

critical need for additional public parking spaces in this area to accommodate the short-term parker whose business in the Terminal Building required him to be there only a few minutes. At the time of its bid, plaintiff was not made aware of these plans.

Final plans for reconstruction of the aforesaid areas were completed, and approved in the spring of 1958. Construction began in July, and was completed in October of the same year. The changes thus made were substantial. The traffic circle and the traffic island partially surrounding it were both reduced in size considerably; two adjacent triangular-shaped islands were also cut to a much smaller size; and the median strip on Smith Boulevard was removed. The primary reason for these changes was to provide greater street width for loading and unloading purposes and to expedite a safe flow of traffic in this congested area. In this respect, the changes were successful and resulted in an improved flow of traffic, which also required additional short-term public parking space under the control of parking meters in the area adjacent to the Terminal Building. To this end, defendant provided 101 additional metered parking spaces around the traffic circle and along Smith Boulevard to the vicinity of the entrance to the public parking lots. A number of considerations influenced defendant's representatives in deciding to install this large number of new parking meters in the terminal area. Although an absolute prohibition against any parking in the area would have furthered the primary objective of improving the flow of moving traffic, the C.A.A. representatives felt that some short-term parking spaces near the terminal were essential to properly handle traffic in that area. Free parking under the control of signs containing a time limitation is considerably more difficult to enforce than parking by meters, which provides police with a simple visual indication of violations, and hence results in a desirable rapid turnover and efficient use of

available spaces. In addition to their primary regulatory functions, parking meters have the desirable advantage of producing substantial revenues to the Governmental owner.

For these reasons, in October 1958, defendant installed 101 additional parking meters on the traffic circle and Smith Boulevard, as above described. Then in February 1959, defendant removed seven meters at the traffic circle and installed 28 new metered parking spaces on the street in front of the recently completed North Terminal Building which is directly across the street from the rear, or eastern boundary, of plaintiff's Lot No. 1. Thus, during these periods, a new total of 122 new metered parking spaces were added by defendant.

The record shows that thereafter on June 15, 1959, plaintiff's attorney wrote and advised the Federal Aviation Agency of its intention to file suit because of the installation of the additional meters by the Government. By reply dated July 17, 1959 the F.A.A. furnished additional operating data, and also denied that by virtue of the contract, plaintiff became the sole parking concessionare at the airport. Plaintiff filed its petition here on October 9, 1959 for breach of contract, but continued to operate through September 1960 for the full three-year period of the contract.

During the first six months of the contract period, plaintiff suffered a net loss in each month ranging from a low in October 1957 of $1,311 to a high in February 1958 of $6,846. The five months beginning with April 1958 showed a net profit. However, in September 1958 plaintiff again suffered a net loss, although in a relatively small amount. For the succeeding 18 months, plaintiff suffered a net loss in each month; the total loss for the period averaged about $4,100 per month. During the last six months of the contract, plaintiff had net profits in three of the months and

net losses in the remaining three, all being in relatively small amounts except for a net profit of $4,125 in the last full month of the contract.

Plaintiff's revenues from long-term parking (over 25 cents parking fee), with some variations, increased from $222,972.94 in its first year of operation, to $275,616.77 for the third and last year. Plaintiff's short-term parking (25 cent fee) revenue rose quite steadily during the first year of operation from $7,281.25 in October 1957 to $13,836.75 in August, and $9,127.50 in September 1958. From the time that defendant began to install its additional parking meters in October 1958, plaintiff's revenues from short-term parking, which had previously shown an upward trend, began a sharp decline from which they never recovered. The short-term revenues fell from a total of $111,609.75 for the first year to $44,257.00 for the second year, and $36,533.25 for the third year.

The only significant change in conditions at the airport which bore directly on short-term parking was the installation of the 122 new parking meters in October 1958 and February 1959. Although there were other adverse factors, this installation of new meters by defendant was the primary and proximate cause of the sharp decrease in plaintiff's short-term parking revenue.

Plaintiff's action is based upon a claim of breach of an implied warranty that defendant would not unilaterally hinder or make more burdensome plaintiff's performance of its parking concession contract with defendant. When defendant in 1957 furnished its "Data Sheet" to plaintiff with information as to existing operations of the parking concessions, including gross income therefrom, plaintiff contends that it had a right to rely upon an implied warranty that the basic factual data and the competitive position of the parking concessionaire would remain reasonably constant throughout the three-year period, and

that defendant would not unilaterally alter this pre-existing factual basis.

We do not adopt this interpretation of the circumstances under which this contract was made. The contract did not expressly or implicitly warrant what plaintiff contends. Plaintiff knew when it bid that there were already 32 competitive parking meters in the street adjoining the Terminal Building and free employee parking at the airport. Despite the fact that plaintiff had a number of other exclusive contract concessions at the airport, it never asked for an exclusive concession for the parking lots. Defendant never intended to grant one, and none was included in the contract.

Plaintiff's bid was prepared by one of its executives, C. J. Sabatino, who had previously and successfully prepared bids for parking concessions for plaintiff at several other airports. In addition to his expertise in analysis of airport parking concessions, Sabatino was generally familiar with the layout of the Washington National Airport and its parking areas. He knew that about 30 competitive public parking meters had been previously installed by defendant near the Terminal Building, in addition to employee parking space.

The regulations of the Civil Aeronautics Administration published in the Federal Register, provided that the Director of the Airport could designate areas on streets and roadways for limited parking, and could control these parking spaces by meters. By statute, the public is charged with knowledge of these regulations, and in view of plaintiff's extensive experience in airport parking concessions prior to entering into its Washington Airport contract, it had at least constructive knowledge thereof. Plaintiff had no reason to assume that the Airport Director would not exercise his authority under these regulations to enlarge the streets and to provide additional limited parking space with metered control in the addi-

tional areas thus provided. Such an implied condition or warranty cannot be read into this contract.

Plaintiff entered into this contract with full knowledge that defendant was already competing with the parking lot concession with 32 Government parking meters on the streets and circle adjoining the Terminal Building, and with an employee parking space. Although the Government had previously contemplated changing and enlarging the street and traffic rotary areas, including the addition of limited parking thereon with meter control, as well as the potential need for more public parking areas at the airport, and had prepared studies and plans accordingly, it does not appear that any definite decision had been made at the date of contract. The Government did not desire to restrict any possible future parking developments. Perhaps the Government should have divulged its future intentions of expansion of its own competitive parking meter operation when it asked for bids, but its failure in this respect cannot be charged as bad faith or fraud. Even though plaintiff depended largely upon the data furnished by defendant in making its own expert analysis, it had no right to assume that the Government would not make changes which would alter or enlarge the existing competitive situation.

The Government did not establish new parking lots in competition with plaintiff's concession space after making the contract. It expanded its existing operation by installing the new meters along the streets and roadways in the area where it had already installed and operated 32 meters.

In *Bateson-Stolte, Inc.* v. *United States,* Ct. Cl. No. 141-57, decided July 18, 1962, 305 F. 2d 386, this court considered the circumstances under which implied provisions not to hinder performance would be assumed as part of a contract. Where the evidence showed that defendant would

not have expressly agreed to such a provision in the contract, the court said, slip op. p. 4, 305 F. 2d at 389:

> • • • Since defendant would never have expressly agreed to such a provision, it cannot be successfully contended that defendant impliedly agreed to it.

In the present case, the record establishes that in view of its future plans, the Government would not have agreed to any provision in the contract which would have prevented its contemplated expansion of the streets and circle, and control of parking thereon by parking meters, and no such provision can be implied. The record also establishes that the Government, prior to the contract, had decided not to give the concessionaire any exclusive franchise.

In the case of *McGuire d/b/a Goose Hill Lodge* v. *United States*, Ct. Cl. 510-58; decided July 18, 1962, 305 F. 2d 449, plaintiff had a Federal concession to run a hunting lodge in a wild-life refuge area. Plaintiff contended that, after making the contract, the Government reduced the hunting season for geese, thereby making the refuge area less attractive for hunters; and breaching an implied condition of its contract not to hinder or render performance of the contract more difficult. The court held that there was no such implied warranty or agreement; that hunters generally were aware of the power of the State and Federal Government to regulate the hunting season for geese in the interests of conservation.

Any implied agreement or warranty by the Government not to materially alter the existing competitive situation would have the clear effect of preventing any further control of parking by the Government through the use of additional parking meters in additional street and traffic circle space adjoining the Terminal Building. This regulatory authority had been expressly delegated to the Federal Aviation Agency by express published regulation. Although parking meters produce substantial revenue,

their primary function for the Government is to control parking through rapid turnover and most efficient use of available space in congested traffic areas. In the words of our decision in the *Goose Hill Lodge* case, *supra*, "it is difficult to visualize responsible officials who are charged with any phase of conservation signing a contract which could by any possible construction mean what plaintiffs insist this contract means." It is equally difficult for us to now envision the C.A.A. signing a parking concession contract which by implication would prevent the Government from changing its own existing parking operation.

We therefore find that there was no implied condition in plaintiff's concession contract that the competitive situation, as it existed at the time of making the contract, would not be altered by defendant or that it would remain substantially undisturbed for the term of the contract.

Accordingly, we conclude that there was no breach of the contract by defendant's installation of the 122 new metered parking spaces after the date of the contract.

Defendant also contends that the installation of the additional parking meters after the making of the contract in October 1957, and their subsequent operation by defendant during the period of the contract, was a sovereign act for which the United States is not liable in contract.

The primary purpose of the Government in the new installation was the regulation of short-term parking in a congested traffic area adjoining, or close to, the Airport Terminal Building, as part of a plan of enlargement of facilities for regulation and control of the increasing traffic in this specific area.

The traffic regulations were prescribed by the Administrator of the Civil Aeronautics Admnistration through authority pursuant to an Act of Congress, 54 Stat. 687 § 2, 7 D.C. Code § 1302.

The Administrator accordingly adopted regulations governing operation and parking of automobiles, including the following:

> *Parking.* (a) No person shall park any motor vehicle on the airport in excess of the time limit prescribed by the airport director for the particular parking area.
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> • • •
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> (c) No person shall park a motor vehicle in a metered parking space without depositing in the parking meter controlling such parking space the required sum of money for the length of time stated on such meter, • • •. [14 C.F.R. § 570.27.]

The meters plantiff here complained of had a notice thereon stating:

> Police regulation. Insert coin. One hour limit. One dime thirty minutes, two dimes sixty minutes. Use dimes only. Meter parking enforced at all times including nights, Sundays and holidays. [Steiner, Tr. 655.]

Criminal penalties were also particularly prescribed for the violation of these regulations [14 C.F.R. § 570.131]:

> *Penalties.* (a) Any person who knowingly and willfully violates any rule or regulation prescribed in this part, on any order or instruction issued by the airport director authorized herein, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $500, or imprisoned not more than six months, or both.

The Commissioner has found that:

> The record shows that, with the relatively small police force at the Airport, it was exceedingly difficult to enforce parking regulations without the assistance of parking meters. (Fdg. 16.)

The Trial Commissioner further found that in addition to their primary regulatory functions, parking meters have

the desirable advantage of producing substantial revenues to the Governmental owner. However, this additional financial benefit does not change the primary function of parking meters in public regulation of traffic and parking.

In *Wah Chang Corp.* v. *United States*, 151 Ct. Cl. 41, 282 F. 2d 728 (1960), plaintiff contended that the condemnation of a pier leased and required by plaintiff for its operations was a breach of an implied condition of its contract with the Government that neither party would do anything to prevent, hinder or delay the performance of the other. The court said, at p. 50, 282 F. 2d at 734:

> Within the rule that prevention of performance by the other party constitutes a breach of contract there has been carved out the exception or qualification that the United States as *contractor* cannot be held liable directly or indirectly for the public acts of the United States as a *sovereign*. *Jones* v. *United States*, 1 Ct. Cl. 383, 385 (1865). [Emphasis supplied.]

This doctrine had received the approval of the Supreme Court in *Horowitz* v. *United States*, 267 U.S. 458 (1925).

Traffic regulations have been specifically held by this court to be sovereign acts for which the United States is not liable in contract. *Hallman* v. *United States*, 107 Ct. Cl. 555, 68 F. Supp. 204 (1946).

The use of meters to regulate parking and to collect a fee therefor is designed to diminish the vice of overtime parking and consequently speed up traffic, and has been held to be a police power function of traffic regulation on the public streets. *Automobile Club of Missouri* v. *St. Louis*, 334 S. W. 2d 355 (Mo. 1960); *Kimmel* v. *City of Spokane*, 7 Wash. 2d 372, 109 P. 2d 1069 (1941).[1]

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[1] Other cases in point are: *Bloomington* v. *Wirrick* 381 Ill. 347, 45 N.E. 2d 852 (1942) *cert. denied* 319 U.S. 756; *Bowers* v. *Muskegon*, 305 Mich. 676, 9 N.W. 2d 889 (1943); *Roswell* v. *Mitchell*, 56 N.M. 201, 242 P. 2d 493 (1952); *Wm. Laubach & Sons* v. *Eastern*, 347 Pa. 542, 32 A. 2d 881 (1943).

A parking meter has been defined as a clock set on a post which measures the time of parking *and provides mechanical assistance in the enforcement of the parking limitation. Cassidy* v. *City of Waterbury,* 130 Conn. 237, 33 A. 2d, 142 (1943).

We conclude that the regulation of traffic and parking by defendant through the use of parking meters at the Washington National Airport was primarily a public and general act of sovereignty performed for the public good within the meaning of the *Horowitz* case, *supra,* and was not arbitrary and unreasonable so as to remove it from the category of sovereign acts which do not constitute breaches of implied terms in the contracts of the United States. *Wah Chang Corp. supra,* and cases therein cited.

Plaintiff is not entitled to recover, and therefore its petition is dismissed.

Defendant has asserted a counterclaim. Under the contract plaintiff agreed to pay a specified per centum of gross receipts in excess of the guaranteed minimum. Plaintiff was required to furnish a certified statement to defendant of all of its gross receipts each month. The basis of the counterclaim is the assertion by defendant, on information and belief, that plaintiff received parking fees in excess of the amounts reported as gross receipts, the amount of which was unknown to defendant. Plaintiff denied this in its reply to the counterclaim, and asserted that it had correctly reported its gross receipts.

The Trial Commissioner has found that if defendant is entitled to recover on its counterclaim, the amount reasonably allowable is $9,565.88. Neither party has excepted to this finding, and plaintiff in the conclusion of its brief, asserts that it is entitled to a judgment in the total amount of its claim "less the set-off of defendant's counterclaim ($9,565.88)." Defendant makes no reference to the counterclaim in its brief. We conclude that defendant is entitled

to recover on its counterclaim in the sum of $9,565.88. Judgment is entered for defendant in this amount.

JONES, *Chief Judge*, dissenting:

I do not question the immunity of the Government from liability for its essential sovereign acts, but I do think it important to realize that whether the action taken should be classed as such a sovereign act as would justify an exemption from liability depends upon the setting and facts of the particular case; also it is important to determine whether some other action might have served the purpose.

Just because the Government has the sheer power to claim that a certain action was taken in its asserted sovereign capacity does not mean that a Government agency may disregard its voluntary contract obligations, nor that it may ride roughshod over the citizens' rights by simply donning the cloak of immunity without showing a necessity for doing so. That would mean going back more than 100 years to the time when we still had the reflected doctrine of "the King can do no wrong."

The question here is not whether the Government may perform an essential sovereign act. That is conceded. The question here is whether there was sufficient necessity for the particular act to justify the Government interfering with the successful operation of its own contract without any adjustment of damages caused to one of its own citizens, who was the other party to the contract.

When the Government enters into a contract it should carry out its terms in good faith, and invoke its great power of a sovereign act when and only when and to the extent necessary to carry out its essential governmental functions. As was stated by Chief Justice Waite in the case of *Cooke, et al.* v. *United States*, 91 U.S. 389, 398 (1875):

> If it [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it

submits itself to the same laws that govern individuals there.

In *Goldblatt* v. *Hempstead*, 369 U.S. 591, 594 (1962), in which, commenting on the effect of a Government regulation on an outstanding contract, the Supreme Court said:

> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); see *United States* v. *Central Eureka Mining Co., supra.* There is no set formula to determine where regulation ends and taking begins. • • •
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> • • • The classic statement of the rule in *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), is still valid today:
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> > "To justify the State in .... interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." [pp. 594-595.]

Thus, to come within the rule of immunity for a sovereign act, the action taken must be (1) in the public interest, (2) must have general rather than a specific or local application, and (3) if it goes too far it will be recognized as a taking.

There are a number of reasons, good and sufficient, which should preclude exemption from liability in the present case:

1. The defendant owned all the land involved here. There was no other convenient area which could be used by a competitor for parking purposes aside from the land owned by the Government. At the time of signing there was nothing in the appearance of the premises to indicate the possibility of competing parking space, and certainly

no indication that the Government meant to change the premises.

2. As an inducement to bidders, the defendant submitted a data sheet showing gross receipts from this particular parking area for the previous 12-month period to have been $341,780. It disclosed the total number of airline passengers enplaning and deplaning for the two previous fiscal years. It showed an increase in passengers in 1957 over the number of such passengers in 1956. It submitted an estimated increase of a substantial percentage for the year 1958. The invitation also stated that the Government would not consider a proposal which contained a minimum guarantee of less than $175,000 for each contract year. The Government later increased this minimum to $225,000 per year. The contract as actually signed required plaintiff to pay the defendant 86.4 percent of the gross receipts up to $360,000 per annum; the percentage increasing up to 95.1 percent of all receipts above $400,000 with the guarantee of minimum rental of $300,000 per annum, whichever was greater.

3. At the time of the letting of the concession contract, the defendant had in contemplation and under discussion a plan to increase the number of parking meters. It did not disclose this fact to the bidders. I believe, in fairness, the Government owed the duty to have told plaintiff before the contract was signed of its contemplated increase of parking meters. As early as 1956 the defendant's representatives were seriously considering various proposals for increasing the number of parking meters in this general area, but this fact was not in any way disclosed to plaintiff prior to or at the time of signing the lease contract. There can be no question that plaintiff was misled to its damage by the Government's withholding of information. (Finding No. 7.) Defendant's withholding of information, under the circumstances of this case, amounted to a breach of contract under the holding of this court in *Ragonese* v.

United States, 128 Ct. Cl. 156 (1954). See *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1 (1920).

Judge Learned Hand in *Heil* v. *United States*, 273 Fed. 729 (1921), at page 731, used the following language:

> • • • Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences.

4. After the contract had been signed, the defendant widened the so-called street or driveway, reduced the island circle so as to make more room, removed the no-parking signs that had been placed on some of the narrower places, installed 122 new meters from which the Government collected and pocketed the money, and at the same time continued to exact the minimum guaranty rental from the plaintiff even though plaintiff's receipts concurrently went down through the remaining 2 years of its contract, causing the plaintiff to lose money during that period. During the same 2 years the defendant's income from parking meters leaped from $21,000 during the previous years before the new meters were installed, to $88,353 during the first year after the installation of the new meters (the second year of the contract), and to $98,304 during the third year of the contract. Plaintiff's receipts were correspondingly reduced during this period.

The primary cause of the decrease in plaintiff's short-term parking revenue was the installation by defendant

of the 122 new parking meters after the contract had been signed. (Finding No. 16.)

The so-called "parking regulation" did not rise to the dignity of a sovereign act, but sank to the level of a local rule of convenience. It was an affirmative act on the part of the Government which caused plaintiff's receipts to be reduced substantially and it turned what would have been a profitable concession into one that entailed a substantial loss. This was an act of interference on the part of the Government which the circumstances of this case do not justify. *State of California* v. *United States*, 151 F. Supp. 570 (N.D. Cal. 1957); *Bateson-Stolte, Inc.* v. *United States*, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959); *Sunswick Corporation* v. *United States*, 109 Ct. Cl. 772, 75 F. Supp. 221 (1948).[2]

We quote from the opinion of the Supreme Court in the *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393 (1922), at 415, as follows:

> • • • When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
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> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

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[2] It is stated in the opinion of *Wah Chang Corporation* v. *United States*, 151 Ct. Cl. 41, 49, 282 F. 2d 728 (1960):

"This court has held that it is 'an implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance.' *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 94 (1947). See also *United States* v. *Peck*, 102 U.S. 64 (1880); 5 Williston, Contracts § 1293A (Rev. Ed. 1937); Restatement, Contracts § 315."

The particular regulation was not necessary. There were other means of controlling the traffic in the area without installing meters, e.g., the findings state that "[a]lthough an absolute prohibition against any parking in the area would have furthered the primary objective of improving the flow of moving traffic, they [defendant's representatives] felt that parking spaces near the terminal were badly needed to accommodate the short-term parker." Why did the Government choose the installation of parking meters of its own to control traffic when other equally effective methods were available which would not interfere with plaintiff's successful operation of the leased parking area? It could have permitted plaintiff to install and operate the additional meters or to operate them after defendant had installed them. It could have made an adjustment in the rental guarantee. It could have adjusted the contract price. It could have permitted plaintiff all net profits arising from the extra meters it installed to be applied as a credit on the payments otherwise due the defendant. It could have credited all receipts from the extra meters, less actual operating costs, to a reduction in the contract price. It could have had an unloading zone without parking meters. There were many ways of adjusting the situation without brusquely ignoring its own obligation under a contract of its own choosing. Is it possible that the officials in charge were persuaded by the fact that the Government would get more money even though the increased revenue would be at the expense of one of its citizens who had contracted in good faith with the Government? Without ceremony, negotiation, or adjustment, it used its stark power to destroy a contract which it had initiated.

This was an attempt to bring far more under the protective umbrella of a sovereign act than can be logically brought within its appropriate shelter.

It is one thing to exercise the power of sovereign immunity when it is an essential part of progress and devel-

opment. Every property owner is aware of this latent power before he becomes the owner of property. But it is an entirely different thing for the officials of Government to place a show window outside the gates depicting the advantages of a contract to be performed within its enclosure; and then after a contract is signed, and without previous notice, to throw a road block in the form of affirmative acts of interference which destroys any chance of a successful operation of the contract, which they had invited.

Does anyone believe the Government, after signing a written 3-year lease contract, could have immediately widened the street and installed parking meters along the entire frontage of the leased parking area, thus destroying the value of the lessee's contract, and still have escaped any liability? That is, in effect, what they did as to the short-term parking privilege. The action of the Government in installing these meters should not be classed as an act of the sovereign with the attendant immunity because it bears no relationship to the "means * * * reasonably necessary for the accomplishment of the purpose" of decreasing traffic congestion, and because the action was "unduly oppressive upon" plaintiff. *Goldblatt* v. *Hempstead, supra; Lawton* v. *Steele, supra.*

Plaintiff was held to the rental payments in spite of its losses occasioned primarily by the action of the Government in installing the new meters. This is swinging the "sovereign act" weapon with a vengeance.

Today, as the activities of Government become more complex and the Government is engaging in wider fields of activity, the need is becoming manifest that there should be a more accurate definition of the term sovereign act and a more flexible application of its effects on day-to-day activities. As we enter the electronics and space age, the contracts with the Government will become vastly more complicated. Already the Government is necessarily

spending billions on national defense involving immense contracts. The Nation's business, which was once primarily local, has become largely interstate, greater sums are being and will be spent on conservation projects, irrigation, soil and water conservation, as well as military and other development projects.

If the contractors on these great projects are to be met at frequent trouble spots with the plea of a sovereign act as a defense against the Government's interference with their operation of public contracts, they will of necessity take these road blocks into consideration in calculating and submitting their bids. The costs to the Government will be higher, the irritations and misunderstandings will be greater and court dockets more crowded.

It would be in the interest of all concerned if either the limits of the term could be better defined or if a more flexible approach to the old harsh doctrine could be had, especially in peacetime periods. As it is, the contractor must face the uncertainty; the lawyers for the defense must raise the defense of a sovereign act if there is any possibility of its application; the lawyers for plaintiff must continue to insist that it does not apply—thus carrying on a continuing cold war. That conflict is gradually ripening into a real battle, with the litigants charging back and forth across a no-man's land, with the courts being caught in the middle. As in most modern wars, everyone loses.

The Government's immunity from the consequences of a sovereign act is a valuable and essential right. It should be invoked where and to the extent it is applicable. But it is a powerful weapon and should not be used in too wide a field or to cover inappropriate matters under the guise of necessary protection for the Government. It is fitting to say, "O, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant."[3]

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[3] "Measure for Measure," Act II, Sc. 2, line 107.

Defense counsel seeks to include within its broad sweep a number of acts by officials of the Government which definitely lap over into the field of interference with the normal operations of its own contracts.

Also from *Ottinger* v. *United States,* 116 Ct. Cl. 282 (1950), at page 285:

> • • • It [the Government] needs no such immunity in order to be able to go on governing wisely and as circumstances require without being hampered by its outstanding contracts. We think that to treat eve y act of a Government agent, done in the name of the Government, as an act of sovereignty within the meaning of the doctrine here under discussion would be a retreat, without reason, from the purpose of the statute permitting citizens to sue the United States for breach of contract.

The facts and circumstances of each case have a bearing on the ultimate application of the doctrine of exemption from liability due to a sovereign act. The record does not justify its application in the instant case.

The facts of record are wholly insufficient to justify the allowance of an independent counterclaim apart from a finding for plaintiff on the general issue.

I would allow plaintiff to recover the sums calculated in the trial commissioner's findings which we have approved as the findings of the court. These findings are based on the actual losses which are shown by the evidence to have been the direct result of the affirmative acts of interference on the part of the defendant.

It would be wholly insufficient to allow the plaintiff the net profits from the meters. No doubt the widening of the streets, and the reducing of the center island, plus the cost of buying, installing, supervising, repairing and collecting from the parking meters was nearly as great, perhaps as great, as the income from the meters during the two remaining years of plaintiff's lease. It was evidently a long-

range program. Besides, the defendant's action destroyed all profits from plaintiff's lease and his actual loss was greater than the amount found by the trial commissioner.

WHITAKER, *Judge,* dissenting:

This is a close case, but I rebel against the idea of the Government's making money out of the renting of additional parking spaces, in competition with plaintiff. Especially so, since these spaces were much more convenient to the terminal building and much cheaper than the price plaintiff was, under its contract, permitted to charge. Not only did the Government enter into competition with its lessee, but also it was unfair competition. No one would park his car in plaintiff's lots if one of these metered spaces was available.

When the street in front of the entrance to the Washington National Airport Terminal Building was enlarged, more parking places became available. What were the airport authorities supposed to do with them? (1) They could have prohibited parking altogether. Plaintiff would not complain had this been done, but this would seem to have been contrary to the public interest. (2) They could have put up signs limiting the time for parking. This would have hurt plaintiff financially about as much as what they did do. (3) They could have installed and did install parking meters, which had the advantage of deriving revenue from the restriction of the time for parking.

We have, then, a conflict between the obligation of the Government to refrain from doing anything to detract from the lawful enjoyment by its lessee of the privilege which it had contracted and paid for, on the one hand, and, on the other hand, the obligation of the sovereign to facilitate the flow of traffic. (Quite clearly parking facilities are a necessary adjunct of traffic flow; there is no point in driving one's car to a place unless there are means of

disposing of it after one gets there.) How can this conflict be resolved?

Would it not be fair and equitable, both to plaintiff and defendant, to allow plaintiff to recover from defendant whatever net profits it derived from the operation of these additional parking meters? It seems so to me, and I would enter judgment to this effect.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Lloyd Fletcher, the briefs and argument of counsel, makes findings of fact as follows:

I. THE PARTIES HERETO AND NATURE OF THE ACTION

1. Plaintiff, Air Terminal Services, Incorporated, is a corporation organized and existing under the laws of the State of Virginia. At all times material herein, its primary business activities consisted of maintaining and operating various types of service and supply concessions at airports, such as public parking lots, dining rooms, bars, drugstores, barber shops, and newsstands. At all material times, defendant owned the aviation facility known as "Washington National Airport" (hereinafter called the "Airport"); the facility was operated by defendant through its agency, the Civil Aeronautics Administration, now the Federal Aviation Agency.

2. As of October 6, 1957, the parties entered into a contract, more particularly described hereinafter, whereby plaintiff was granted the right to operate an automobile parking concession for the use of the public at the Airport. Plaintiff has brought this suit for damages alleging that defendant breached the contract by installing, without the plaintiff's consent, a number of public parking meters on the streets of the Airport. Plaintiff asserts that this unilateral action by defendant hindered plaintiff in the per-

formance of the contract and increased the cost of performance thereof, and that by installing such parking meters, defendant breached an implied warranty that defendant would not substantially alter the pre-existing factual basis under which plaintiff entered into the contract. Defendant asserts that it in no way altered the contractual agreement by installing public parking meters, that plaintiff was not injured thereby since there was no correlation between the installation of the meters and plaintiff's alleged loss of parking revenues, that plaintiff's loss of revenues was due to plaintiff's inefficient and inaccurate accounting records and parking lot controls, and that by not maintaining an adequate accounting and controls system, plaintiff itself has breached the contract for which defendant asserts a counterclaim in the amount of its contractual percentage of estimated lost revenues. Defendant further asserts that its installation of parking meters was for the primary purpose of controlling traffic at the Airport and hence was a sovereign act unrelated to the contract at issue.

II. PRELIMINARY NEGOTIATIONS BETWEEN THE PARTIES

3. On July 29, 1957, defendant sent to prospective parking lot operators, including the plaintiff, its "Invitation for Proposals to Operate an Automobile Parking Concession" at the Airport for a three-year period commencing October 6, 1957. In pertinent part, this invitation stated:

* * * * *

> It is the purpose of this invitation to solicit proposals to continue the operation of an automobile parking concession as stated in the attached Form of Agreement. Any questions regarding this Invitation should be directed to the Airport Director.
>
> * * * * *
>
> As soon as possible, after receipt, the offers will be evaluated on the basis of financial return to the Government, the fitness and ability of the proponent

to serve the public and such other pertinent factors as might be considered in the best interests of the Government. • • •

• • • • • •

The selected contractor shall execute an agreement as set forth in the attached Form of Agreement together with such modifications as may be adopted by mutual agreement.

• • • • • •

• • • The Government will furnish to the concessionaire the ground space known as Areas 1, 6, 7, 8 and Official, as shown on Exhibit No. 1 attached to the Form of Agreement.

Exhibit No. 1 was a map of the Airport showing, among other things, the specific location of the numbered and described parking areas, and also the location of certain employee parking areas. At this time, Areas 1, 6, 7, and 8 were the only parking places (other than 62 metered spaces) that were available to the general public for the parking of automobiles.

The aforesaid invitation was accompanied by a "Data Sheet," a copy of the proposed agreement, and a form upon which to submit proposals. The Data Sheet read as follows:

AUTOMOBILE PARKING CONCESSION DATA SHEET

Effective date to begin operation—October 6, 1957

Location:

Parking Areas 1, 6, 7, 8 and official area (see Exhibit 1 attached to proposed agreement)

Normal Capacity:

Area	*Number of Automobiles*
6, 7, and 8	475
1	400
Official	20

Existing Rates—25¢ for three hours or a portion thereof

Gross Receipts—12 month period ending 5/31/57—$341,780

Existing monthly utility charges paid by concessionaire—$53.85

Past parking lot activity: A one week sampling indicates the average number of cars entering the parking lot daily to be as follows:

November	1956	1,248
January	1957	1,041
April	1957	1,491
July	1957	1,887

Total airline passengers enplaned and deplaned (by fiscal year ending June 30):

Actual	*Estimated*	
1956	*1957*	*1958*
3,815,418	4,201,199	4,500,000

Note: Existing operation is a U-park-it system. One entrance booth and one exit booth serves areas 6, 7 and 8. At least one attendant must be on duty at each booth at all times. In Area 1 the same booth serves for both entrance and exit. Proponents may submit proposals on other methods of operation with different payments to the Government applicable thereto. Any proposed methods of operation other than that now in effect should be explained on a separate sheet and attached to the proposal form. The proposed payments to the Government for each method of operation should be clearly stated.

The form for submission of proposals which accompanied the invitation contained a statement that the Government would not consider a proposal quoting a minimum guarantee to the Government of less than $175,000 for each contract year. On August 16, 1957, defendant amended the invitation by increasing the required minimum guarantee to $225,000 annually and further stated that in

the Data Sheet, the gross receipts of $341,780 for the period ending May 31, 1957, included revenue from the use of parking areas marked 6, 7, 8, and Official, and intermittent use of parking area marked 1. The amendment concluded that the contract contemplated the full-time use of all areas.

4. Plaintiff's representative who prepared its bid for the Airport parking concession was C. J. Sabatino. He was Office Manager and Director of Parking Lots for plaintiff and its affiliated companies with headquarters at Buffalo, New York. Prior to the preparation of the bid in this case, Sabatino had prepared bids for parking concessions at a number of different airports of which bids about 10 had been accepted. In preparing plaintiff's bid on the present invitation, Sabatino did not make a trip to Washington. However, he had previously visited the Airport on several occasions in connection with matters relating to plaintiff's other concessions at the Airport. He was generally familiar with the layout of Washington National Airport and its parking areas. He also knew that about 30 parking meters were installed near the Terminal Building. Sabatino also had at hand general information with regard to conditions at the Airport which had been furnished to him by plaintiff's local manager and its field supervisor of parking lots. He was not furnished, and made no effort to obtain, information concerning the number of persons using the Airport other than passengers, such as sightseers, shoppers, diners, and the like. Nor did he make any particular study of the available public transportation facilities. This type of information, insofar as it is derived from the records of other concessionaires at the Airport, is not made available by defendant to prospective bidders. Primarily, Sabatino relied on the information and material contained in the Data Sheet quoted above, together with his general experience in preparing bids for other parking lot concessions.

5. In preparing plaintiff's bid, Sabatino divided by one-half the total passengers enplaned and deplaned at the Airport for the fiscal year 1956, as set forth on the Data Sheet, in order to obtain an estimate of enplaned passengers.[4] The estimated number of enplaned passengers (1,907,709) was then divided into the gross revenue from the parking lots for one year as set forth on the Data Sheet ($341,780) to arrive at a per capita amount of about 18 cents, this being the estimated average amount spent per customer at that concession. This was 13 cents below plaintiff's average per capita experience with parking lots at other airports, a discrepancy which Sabatino attributed to the use by large numbers of Government officials of transportation other than private automobile.

From his general experience, Sabatino believed that passenger traffic would increase approximately 10 percent per annum, which belief coincided closely with the estimated future pasesnger traffic contained in the Data Sheet supplied by defendant. Utilizing the estimated 10 percent passenger increase per annum and the per capita figure stated above, Sabatino estimated the gross income from the parking lot concession for the first year of operation at approximately $375,000. Making an allowance for contingencies such as strikes or bad weather, he arrived at the sum of $350,000 as his estimate of gross income for the purpose of computing his bid. From information supplied to him by the field supervisor of plaintiff's parking lots, Sabatino estimated the annual expense of operating the parking lots in order to compute the estimated net

[4] Several surveys made by defendant tend to show that there is no consistent relationship between the number of passengers using Washington National Airport and the number of such passengers who arrive at or depart from the Airport by private automobile. However, passenger statistics are readily available, and defendant has consistently furnished such information to prospective bidders because it is believed to be a definite factor for consideration in the course of analyzing business activity at the Airport.

income from the lots during the first contract year. Estimated net income from the parking lots for the second and third contract years was computed in a similar manner. Plaintiff thereupon submitted its bid for the parking lot concession at a rental based upon a percentage of the gross receipts; namely, 86.4 percent of the first $360,000 of gross receipts; 90.2 percent of the gross receipts from $360,000 to $400,000; and 95.1 percent of the gross receipts over $400,000, all on an annual basis with a guaranteed annual minimum rental of $300,000.[5] Defendant accepted plaintiff's bid, and after making the necessary changes and additions to reflect the contents of plaintiff's bid, a contract (quoted in pertinent part below) was prepared in substantial conformity with the Form of Agreement which had accompanied the invitation.

III. THE CONTRACT BETWEEN THE PARTIES

6. The original contract in dispute herein was executed by the parties as of October 6, 1957, and, in pertinent part, provided as follows:[6]

Article I—*Rights of Contractor*

(a) Concession: The Government hereby grants unto the Contractor, subject to all the terms, conditions and covenants of this agreement, the right,

[5] Of the three high bids, including plaintiff's bid, submitted to defendant, there was one bid which exceeded the minimum guarantee offered by plaintiff. However, [illegible]he three bids, plaintiff's bid offered the highest percentage rates on gross receipts, and defendant preferred plaintiff's bid despite its lower minimum guarantee because, on the basis of its estimate of gross business anticipated, defendant believed it would receive a greater return from higher percentage rates irrespective of the amount of minimum guarantee.

[6] The original contract was amended by the parties on several occasions during the performance period. Where pertinent, these amendments are summarized below through the medium of a footnote reference at the particular provision amended.

power, privilege and authority to conduct and operate an automobile parking business or concession at the Airport.

(b) Space. The Government hereby grants unto the Contractor the right to occupy and use space at the Airport as follows:

* * * * *

2. Automobile Parking Facilities. Those areas marked 1, 6, 7, 8, and the official parking area shown and identified on Exhibit No. 1, attached hereto and made a part hereof.[7]

Article II—*Term of Agreement*

The Contractor shall have the rights granted under this agreement for a period of three years, beginning on the 6th day of October, 1957, and ending on the 5th day of October, 1960, unless sooner terminated as herein provided.

Article III—*Charges and Fees*

a. The Contractor shall pay to the Government 86.4% of his gross receipts up to $360,000; 90.2% of his gross receipts from $360,000 to $400,000; 95.1% of his gross receipts in excess of $400,000, or a guaranteed minimum of $300,000, whichever is greater, each contract year during the term of this agreement.

The guaranteed minimum shall be prorated on a monthly basis and paid in advance on the first day of each month during the term of this Agreement.

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[7] This provision relating to the leased parking area was amended on two occasions. On January 26, 1958, it was amended to give plaintiff the right to use up to 50 spaces (on a space available basis) in the employee parking lot for the purpose of providing parking space for automobiles of scheduled airline flight crews at a reduced rate. On June 1, 1958, the area provision was amended so as to eliminate the "official parking area" therefrom and to provide for free parking by Official Government, Congressional, and Diplomatic vehicles in areas 1, 6, 7, and 8 whenever the "official parking area" was filled to capacity.

The Contractor shall furnish to the Airport Director on or before the 15th day following each calendar month, a certified statement, in the manner the Airport Director may prescribe, of the gross receipts from its operations under this Agreement for the previous calendar month and he shall at the same time pay any amount by which the payment due computed on the basis of the percentage of recipts specified in this Article III may exceed the guaranteed minimum, as prorated, for that month. Such certified statement shall include all gross receipts from Contractor's operation under this Agrement. If this monthly prorating results in any overpayment on an annual basis, the Contractor shall be entitled to an appropriate credit from the Government. However, deficits may not be carried forward beyond any contract year.

* * * * *

Article V—*Undertakings by the Contractor*

The Contractor covenants and agrees:

* * * * *

c. To observe and obey all rules and regulations which are now in force or which may from time to time during the term of this Agreement be promulgated by lawful authority for the care, operation, maintenance, or protection of the Airport.

* * * * *

e. At all times and at his own cost and expense to take good care of the buildings and premises to be occupied hereunder * * *, and shall make all repairs and improvements to, and replacements and alterations of, the operating facilities, and other facilities and equipment installed by the contractor which may be necessary to maintain and keep the same in as good condition as at the beginning of the term of this Agreement, ordinary wear and tear excepted. The Airport Director shall have the right to disapprove any such improvements, replacements, or alterations which in his judgment are of a design, quality, condition, or color arrangement not in keeping with the architectural and general character of the Terminal Building and the Airport. * * *

* * * * *

Article VI—*Operating Conditions*

The Contractor agrees that, at his own cost and expense, he will:

a. Provide proper, adequate and efficient control over the areas leased hereunder and provide such number of persons as may be necessary, in the opinion of the Airport Director, to adequately and efficiently conduct the concession granted herein; *Provided*, that the Airport Director shall have the right to require the dismissal of any employee of the contractor considered by the Airport Director to be undesirable.

• • • • •

c. Provide all necessary equipment and facilities required in the operation of the parking concession granted hereunder, including identification media such as tickets and stickers, and all signs, booths, toll gates, or other devices, the location number, size and appearance of all such items to be subject to the approval of the Airport Director.

• • • • •

g. To operate the parking concession granted herein on a Twenty-four (24) hours per day, seven (7) days per week basis, including all holidays: *Provided*, that the Airport Director may, in his discretion, allow the operation of any of the areas to be operated by the Contractor hereunder on a part-time basis if he finds that full-time control or operation of any such area is not necessary.

h. Provide such controls and records on the operation of the business as may be deemed necessary by the Airport Director to support the statement of receipts and the payment of fees and charges to the Government. He shall maintain in accordance with accepted accounting practice, during the term of this Agreement, for three (3) years after the expiration or termination thereof, and for a further period extending until the Contractor shall receive written permission from the Airport Director to do otherwise, records and books of account recording all transactions at, through, or in anywise connected with the Airport.

i. Permit in ordinary business hours during the term of this Agreement, for one year thereafter, and during such further period as is mentioned in the preceding paragraph (h), the examination and audit by the officers, employees and representatives of the Government of such records and books of account * * *.

* * * * * *

j. Use his best efforts in every proper manner to maintain and develop the business conducted by him under this Agrement and to increase the same; he shall not divert or cause or allow to be diverted, any business from the Airport.

Article VII—*Conduct of Business*

(A) The Contractor covenants and agrees that Areas numbered 1, 6, 7, and 8 on Exhibit No. 1 shall be operated as a parking area for airline passengers, the general public, airport visitors and others, at the rate of Twenty-five (25¢) Cents for each three hour period or fraction thereof.[8] * * *

(B) The Contractor may from time to time during the term of this Agreement, petition the Airport Director for an adjustment of the parking rates and the type of parking allowed as set out in this Article VII and the Airport Director may, at any time and at his discretion, and subject to all applicable laws, adjust such rates and the type of parking allowed in each area.

(C) The Contractor covenants and agrees to permit Official Government, Congressional, and Diplomatic vehicles to park free of charge * * *.

* * * * * *

[8] On June 1, 1958 and again on October 1, 1958, the contract was amended in order "to attract new business and increase the revenue to the Government" by permitting the plaintiff to provide free parking for a limited period of time to customers of the Airport Terrace Dining Room.

Article IX—*Termination by the Government*

The Government shall have the right to terminate this Agreement in its entirety immediately upon the happening of any of the following events:

* * * * *

5. The failure by the Contractor to perform, keep, and observe any of the terms, covenants, and conditions herein contained on the part of the Contractor to be performed, kept, or observed after the expiration of fifteen (15) days from the date written notice has been given to the Contractor by the Government to correct such default or breach.

* * * * *

7. In the preparation of the foregoing contract, defendant's representatives had given some consideration as to whether defendant should grant an exclusive franchise for public parking at the Airport.[9] They decided not to include a provision in the contract giving the concessionaire such exclusive franchise. Although the areas covered by the contract were at that time the only public parking areas at the Airport (other than metered spaces), and although there had been no official decision to open up any new public areas, the defendant's representatives had discussed, and were aware of, the potential need for more public parking areas at the Airport. They did not desire to restrict the Government as to any possible future parking developments.

Neither did defendant's representatives intend to relinquish, or in any way limit, defendant's control of traffic or

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[9] For sometime prior to the submission of its bid for the parking lots, plaintiff had held other concessions at the Airport, the contracts for which contained clauses granting plaintiff an exclusive right to conduct the named business at the Airport or on some part of the Airport. For example, plaintiff's contract for the barber shop concession provided that "The Government will not grant to any other person, during the term of this agreement, the right to engage in this same primary business in the Terminal Building."

parking on the Airport streets and roadways. For a number of years prior to the present contract, defendant's representatives at the Airport had made extensive studies as to the desirability of changing substantially the street areas and traffic rotary near the entrance to the Terminal Building. These studies, particularly those in 1956, included various proposals for increases in the number of parking spaces, both metered and otherwise, in this general area. Prior to the preparation of plaintiff's bid and its execution of the aforesaid contract in 1957, none of plaintiff's representatives had been informed by defendant as to the possibility of such future changes in public parking facilities at the Airport. If Sabatino had been made aware of plans for possible additional parking spaces it is reasonable to conclude that, in computing plaintiff's bid, he would have asked defendant for specific information in this regard in order to estimate potential lost revenue to the parking lots with a resultant downward adjustment in plaintiff's bid. He had followed this procedure in bidding for other parking lots where he had been advised of the possibility of the owner installing public parking meters.

IV. PLAINTIFF'S OPERATION OF THE PARKING LOTS

8. On the effective date of the contract, October 6, 1957, plaintiff entered into possession of the parking lots and commenced operation thereof. Plaintiff's field supervisor of parking lots had studied the reporting forms, parking tickets and other control methods which were used on the parking lots by the prior operator. He approved of these controls and recommended their continuance by plaintiff. His recommendation was approved, and permission was sought and obtained from defendant to continue the same type of operation as previously conducted. This procedure may be summarized thusly. A three-part, time-stamped and dated ticket issued in numerical sequence was handled by the parking lot attendant manually. When a parker

drove his car to the booth, the attendant would place one part of the ticket on the car windshield, hand one part of the ticket to the parker, and keep the remaining part in the attendant's booth. The parker then proceeded to park his car in a space of his own choice. These three-part tickets were issued in different colors, and a different colored ticket would be used each day to assist the attendant in determining what day a car had entered the lot. Also, an inventory of cars on the parking lots was made each day. In making this daily inventory, the attendant would place still another ticket on each car present, and on a second part of this additional ticket he would record the license number and make of car. This inventory was made for the purpose of verifying that no cars had left the lot for which a ticket still remained in the booth, and also to furnish a further check, within 24 hours at least, of the number of days a particular car had been on the lot. The inventory had control significance only with respect to cars parked longer than one day, and the additional ticket used in the inventory count is known as a COD (Car-Over-a-Day) ticket.

In addition to the foregoing ticket procedures, the prior operator used daily report forms which were also adopted by plaintiff. These report forms were filled out by each lot attendant at the conclusion of his 8-hour shift. Spaces were provided on the report forms wherein the attendant was required to enter information as to the number of tickets issued, total cash received, cars held over, tickets voided, and the like.

Defendant's financial supervisor at the Airport made a study of the procedures described above, and he felt that when properly supervised they afforded a "pretty good control" for parking lot operation.[10] While the system works

[10] As described below, in April 1958, plaintiff inaugurated some changes in these procedures incident to the installation of an automatic ticket dispenser. See finding 9, *infra*.

well from an accounting standpoint, it requires more personnel than, and does not expedite traffic as much as, a system based on an automatic ticket dispense. See findings 9 and 10, *infra*. The system also does a good job in accounting for parking tickets issued, although it is not foolproof in this regard. All lessees of the Airport parking lots have experienced difficulty from time to time in accounting for lost tickets.

9. For purposes of convenience in record keeping, plaintiff divided the leased parking areas into two lots, each being separated from the other by the main street at the Airport known as Smith Boulevard. Lot No. 1 lay east of Smith Boulevard and encompassed the areas referred to on Exhibit 1 to the contract as areas 6, 7, and 8. Lot No. 2 lay west of Smith Boulevard and encompassed the area referred to on Exhibit 1 to the contract as area 1. In March 1958, defendant wrote plaintiff complaining that a number of tickets issued in March were missing and that reports had been received of cars leaving the lots without payment of the parking charge. Defendant asked for improvements in control procedures. In April 1958, plaintiff obtained the consent of the Airport Director to move the entrances to both Lots 1 and 2 and also to install on Lot 1 an automatic ticket dispenser (referred to generally in the trade as a "ticket spitter.") Such a machine was thereupon installed by plaintiff at the entrance to Lot 1. It was so designed that when a car passed over a treadle laid across the entranceway, a one-part ticket would issue out of the machine automatically. The tickets were contained inside the machine in the form of a long roll and were all the same color. They were numbered in sequence. When an incoming car ran over the treadle and activated the machine, a single ticket would issue from it automatically dated and time-stamped. The parking customer took the entire ticket with him and proceeded to park his car in any open space on the lot. No ticket stub, or other record of the customer's entry, was retained by the lot attendant. This automatic system

contemplated merely that when a customer exited from the lot he would present his ticket previously received from the machine, and the lot attendant at that time would compute and collect the proper parking charge.

As stated, plaintiff installed an automatic ticket "spitter" only at the entrance to Lot 1. However, plaintiff adopted the same procedures for Lot 2, the only difference being that the Lot 2 attendant (instead of a machine) would date and time-stamp the entire ticket and then manually hand it to the incoming customer.

Also, around this time, plaintiff moved the entrances to both Lots 1 and 2. The entrance and attendant's booth for Lot 1 had been located near the south end of the lot quite near the Terminal Building and traffic circle. The entrance to Lot 2 was also located in this area diagonally across Smith Boulevard. This entrance was a common entrance to both Lot 2 and the adjacent employee parking lot. During peak hours, traffic in the vicinity of these two entrances became quite congested, and after obtaining the consent of the Airport Director, plaintiff therefore moved both entrances to the north some 600 feet. Also with the consent of the Director, the boundary between Lot 2 and the employee parking lot was secured by a fence, and thereafter the airport employees entering and leaving the free lot had their own entrance thereto separated from the entrance to the paid public area.[11] The total cost to plaintiff of making the aforesaid changes, including installation of the ticket spitter, was $4,937.16.

10. At the time of preparing its bid estimates, plaintiff had estimated that the installation of a ticket spitter would save labor costs of approximately $7,300 annually. The

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[11] For reasons not aparent from the record, this action in separating the two parking areas appears to have caused angry complaints from airline employees. Later, at the request of defendant, the fence was removed.

prior operator had utilized around 12 lot attendants and a lot manager, and plaintiff did the same until it installed the ticket spitter on Lot 1 in April 1958. Thereupon, plaintiff reduced the number of its parking lot personnel to eight persons comprising six lot attendants, a lot manager, and assistant manager. Three 8-hour shifts were operated. On Lot 1 plaintiff used one attendant on each of two shifts and two attendants on the busiest shift. On Lot 2 plaintiff used one attendant on each of two shifts, and, after obtaining the permission of the Airport Director, no attendant was used on Lot 2 on the relatively inactive midnight to 8:00 a.m. shift. During this latter shift, the Lot 1 attendant handled both lots utilizing a chain installed across the entrance to Lot 2 coupled with a signal device whereby a departing customer could attract his attention.[12] The entrances to the two lots were about 150 feet apart.

11. Except for the procedure described above whereby attendants on Lot 2 manually handed tickets to customers, as contrasted with the automatic dispensing of tickets on Lot 1, the procedures and duties of plaintiff's attendants were basically the same on both lots. At the end of each of the three shifts on each lot, the attendant before going off duty would count and total the number of tickets of each denomination and the total cash collected therefor. This information was listed on his shift report together with all no-charge tickets whether official, courtesy or void. He would remove all money from the cash register except for $75, close out the register, and put all tickets and the cash register tape in a paper bag bearing the date. Then he would put all money (in excess of the $75) in an envelope and place it in plaintiff's safe in the booth. The lot manager at the end of each day checked the figures on each shift report and frequently spot-checked the tickets themselves. He then prepared a daily summary report, counted

[12] This system was abandoned in August 1960, and thereafter an attendant was used on Lot 2 during all shifts.

the cash collected, and made a daily deposit thereof in the bank on business days.

A further duty of plaintiff's employees at the lots was to make a daily lot check, or inventory, as to all cars remaining on the lots longer than one day. Like the prior operator, in making this check the attendant utilized a two-part COD (Car-Over-a-Day) ticket which had corresponding numbers on each part. The attendant would detach one part of this ticket, place the day's date on it, and insert it under the windshield wiper of each car on the lots which did not already have a prior day's COD ticket affixed. On the other part of the ticket, he wrote the date and license number of the car, and he retained this part in the attendant's booth. When a car with a COD ticket left the lot, the attendant removed the ticket from the windshield, located its counterpart held in the booth, and stapled it to the regular parking ticket received from the customer. The part of the COD ticket taken from the car was then thrown away.

While not foolproof, this daily lot inventory is an important control procedure in operating a parking lot so far as long-term parking is concerned. It was not performed by plaintiff's employees with sufficient consistency to satisfy defendant's cognizant representatives at the Airport, and several complaints to plaintiff were made about it by defendant. During most of the contract period, failure to make a daily inventory occurred on an average of once a week.[13] Near the end of the contract period, under a new lot manager, a daily count was always made, and the revenues from long-term parking increased considerably.

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[13] According to one of defendant's witnesses, who had been a lot attendant for plaintiff, the daily inventory was not taken during cold and rainy weather. On such days he considered the inventory a waste of time because when the customer got in his car and turned on his windshield wipers, the COD ticket would be thrown off the car.

V. RECONSTRUCTION OF TRAFFIC CIRCLE, SMITH BOULEVARD, AND INSTALLATION OF ADDITIONAL PARKING METER

a. Basis of plaintiff's claim

12. Plaintiff's claim herein is based solely on its loss of short-term parking revenues, i. e., parking fees of 25¢ per car parked less than three hours. Plaintiff attributes its losses from short-term parking to the installation by defendant in October 1958 and February 1959 of 122 additional metered parking spaces in the vicinity of the terminal buildings and the public parking lots. The facts surrounding such new installations by defendant are related in the immediately succeeding finding.

b. Defendant's reasons for the reconstruction

13. Since at least 1952, defendant's representatives had given periodic consideration to various plans for reconstruction of the street areas and traffic circle in front of the Terminal Building at the Airport. Increasing traffic congestion and illegal parking in this area was a serious problem. Also, the Airport authorities were of the opinion that there was a critical need for additional public parking spaces in this area to accommodate the short-term parker whose business in the Terminal Building required him to be there only a few minutes. At the time of its bid, plaintiff was not aware of these plans.

Final plans for reconstruction of the aforesaid areas were completed and approved in the spring of 1958. Construction began in July and was completed in October of the same year. The changes thus made were substantial. The traffic circle and the traffic island partially surrounding it were both reduced in size considerably; two adjacent triangular-shaped islands were also cut to a much smaller size; and the median strip on Smith Boulevard was removed. The primary reason for these changes was to provide greater street width for loading and unloading purposes and to expedite a safe flow of traffic in this congested area. In this respect

the changes were successful and resulted in an improved flow of traffic.

Another reason for these changes was to provide additional public parking space under the control of parking meters. To this end defendant provided 101 additional metered parking spaces around the traffic circle and along Smith Boulevard to the vicinity of the entrance to the public parking lots.[14] A number of considerations influenced defendant's representatives in deciding to install this large number of new parking meters in the terminal area. Although an absolute prohibition against any parking in the area would have furthered the primary objective of improving the flow of moving traffic, they felt that parking spaces near the terminal were badly needed to accommodate the short-term parker. Free parking under the control of signs containing a time limitation is considerably more difficult to enforce than parking by meters, which provide police with a simple visual indication of violations, and hence result in a desirable rapid turnover and efficient use of available spaces. In addition to their primary regulatory functions, parking meters have the desirable advantage of producing substantial revenues to the Governmental owner.[15]

For these reasons, in October 1958, defendant installed the 101 additional parking meters on the traffic circle and

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[14] In February 1959 defendant removed seven metered spaces from the traffic circle leaving a total of 126 metered spaces in the area, or 94 more metered spaces than had existed prior to October 1958. At the same time 28 new parking meters were installed in the area of the recently completed North Terminal. The space for the additional meters installed at the traffic circle was created by having some cars park at a 45-degree angle to the curb, instead of parallel thereto, and by having other cars park in the additional street area created by reducing the diameter of the circle.

[15] In 1960, approximately two million meters in 3,850 cities of the United States produced aggregate revenues in excess of $126,000,000. During the three years involved herein, the parking meter revenues at the Airport totaled approximately $208,600.

Smith Boulevard, as above described. Then in February 1959, defendant removed seven meters at the traffic circle and installed 28 new metered parking spaces on the street in front of the recently completed North Terminal Building which is directly across that street from the rear, or eastern boundary, of plaintiff's Lot 1. Thus, during these periods, a net total of 122 new metered parking spaces were added by defendant.

c. Impact of new parking meters on plaintiff's parking lot revenues

14. During the first six months of the contract period, plaintiff suffered a net loss in each month ranging from a low in October 1957 of $1,311 to a high in February 1958 of $6,846. Its operations first showed a net profit in April 1958 when it installed the automatic ticket spitter. The four succeeding months also showed a net profit. However, in September 1958 plaintiff again suffered a net loss, although in a relatively small amount. For the succeeding 18 months plaintiff suffered a net loss in each month; the total loss for the period averaged about $4,100 per month. During the last six months of the contract, plaintiff had net profits in three of the months and net losses in the remaining three, all being in relatively small amounts except for a net profit of $4,125 in the last full month of the contract.

15. Apart from the general effect of improving weather,[16] the record does not clearly show why plaintiff's operations should, for the first time, begin to show a profit in April 1958, continuing through August 1958. However, there was a substantial increase in cars parked for those months, and, since the automatic ticket spitter was installed in April, it may reasonably be inferred that the machine made at least a partial contribution to this profit showing because it en-

[16] An unusually severe snowstorm in February 1958 had caused the parking lots to be closed entirely for a number of days.

abled plaintiff to reduce its personnel. Losses commenced again in September and, as noted above, continued for 18 months thereafter.

During September and October of 1958, plaintiff's revenues from long-term parking were increasing. Immediately thereafter there was a relatively small decline in such revenues. Then, for a long period, they held roughly in the neighborhood of $20,000, monthly, until the last six months of the contract period when again they showed a rising trend. See Appendix 1 hereto.

On the other hand, during September and October of 1958, plaintiff's revenues from short-term parking, which had previously shown an upward trend, began a spectacular decline from which they never recovered. From a high point in August 1958 of $13,836, they declined to a low point in February 1960 of $1,676. For the 24-month period commencing in October 1958 to the end of the contract, the monthly average revenue from short-term parking was approximately $3,365. By contrast, the monthly average revenue from short-term parking for the first 12 months of the contract was approximately $9,300.[17]

This downward trend in short-term parking may be stated in still another way. In the first year of plaintiff's contract, short-term cars represented about 80 percent of all cars parked. This percentage dropped in the second and third contract years after the addition of the 122 new metered

[17] The downward trend of short-term parking revenues has continued as shown by the experience of the parking lot concessionaire who succeeded plaintiff in October 1960. For the 12-month period, November 5, 1960 to November 14, 1961, the successor concessionaire received short-term parking revenues averaging only about $1,985 per month. This drop even below plaintiff's monthly average may well be attributable to defendant's installation of 27 more parking meters near the end of plaintiff's contract. However, by reason of a marked increase in revenues from long-term parking, the successor's gross receipts from all parking showed a substantial improvement over the preceding year.

parking spaces to about 59 percent and 52 percent, respectively. In the first contract year, plaintiff's income from short-term cars represented about 33 percent of its total gross income. This percentage dropped in the second and third contract years after the installation of the 122 new metered parking spaces to about 16 percent and 12 percent, respectively.

Meanwhile, immediately following the installation of the new parking meters in October 1958, defendant's revenues from the meters jumped sharply upwards. During the first 12 months of the contract period, the meter revenue was $21,966; during the second 12 months, it was $88,353; and during the last 12 months it was $98,304.[18] See Appendix 1.

16. The record in this case establishes that the primary and proximate cause of the above described decrease in plaintiff's short-term parking revenue was the installation by defendant of the 122 new parking meters in October 1958 and February 1959. The record contains no other fact, or combination of other facts, which can reasonably and satisfactorily account for the sudden and sustained decrease in short-term parking on the two lots. Appendix 1 shows that the downward trend actually commenced in the month preceding the meter installation, but this appears to have been largely due to the fact that, during reconstruction of the traffic circle, many of the existing meters had been removed and a great deal of illegal parking by short-term parkers resulted.[19] Also, during the last quarter of 1958

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[18] Upon the installation of the new meters in October 1958, defendant increased the charges on all meters from 10¢ per hour to 10¢ per one-half hour, and the parker was permitted to insert 20¢ in the meter for a maximum limit of one hour's parking. The record does not indicate what portion of this more than quadrupled increase in defendant's parking meter income was due to the doubled rate. It is reasonable to infer that some part of the additional income was due to the increase in rates.

[19] The record shows that, with the relatively small police force at the Airport, it was exceedingly difficult to enforce parking regulations without the assistance of parking meters.

when plaintiff's short-term parking revenues were showing severe decreases, four major airlines (American, Eastern, TWA, and Capital) were shut down by labor strikes. However, in recognition of this abnormal condition, plaintiff has excluded those months from its claim herein. Also, in April 1958, plaintiff moved the parking lot entrances further from the Terminal Building, and, in June 1958, defendant opened a new free parking lot for Airport employees near Hangar 7. However, these events not only had no appreciable effect on plaintiff's revenues but, except for the last month of the contract, it was during this period of time that plaintiff's operations showed their only substantial profits. One witness at the trial thought there might be some detrimental effect on parking lot usage by reason of the increasing number of air coach passengers in comparison to first class passengers. However, he had made no surveys in this regard; and, due to many variable factors, he found it difficult to say what the effect might be. Accordingly, it must be concluded that the only significant change in conditions at the Airport which bore directly on short-term public parking was the installation of the new parking meters in October 1958 and February 1959.

VI. LONG-TERM PARKING AND PLAINTIFF'S CONTROL THEREOF

17. The number of long-term cars (those parking longer than three hours and paying a fee in excess of 25¢) increased from 111,383 in the first contract year to 123,542 in the second contract year and 134,688 in the third contract year. Viewed on an annual basis, the average charge for such long-term parking remained fairly constant throughout the contract period, averaging $2.00 the first year, and $1.92 and $2.04 the second and third contract years, respectively. However, immediately after the installation of the automatic ticket spitter in April 1958, the average revenue from long-term cars dropped substantially. Prior thereto, the monthly average revenue from long-term cars had been $2.33 per car, but in May 1958 such average dropped to

$1.92 and continued to a low of $1.15 in August 1958. With very few exceptions, the monthly average remained below $2.00 per long-term car until near the end of the contract period.

18. Throughout most of the contract period, plaintiff experienced periodic difficulties in its operation of the parking lots, particularly with respect to control of long-term parking, and its field supervisor found it necessary to visit the lots on numerous occasions in an effort to solve these recurring problems. The major difficulties were these. Being a Government-owned installation, the Airport provided a rather large parking area (with access *via* the parking lot entrances) for free or reduced rate parking by diplomatic, Congressional, official, and Airport employees cars. The drivers of these cars would frequently ignore directional signs, take tickets from the ticket spitter without later accounting for them, and in general caused confusion on the lots from time to time. Airline employees not finding available space on the free employee parking lot would park on the public lots and then on departure refuse to pay even the reduced parking rate to which they were entitled. On numerous occasions, cars would "jump the curb" of the parking lots and leave without paying. On less frequent occasions, parkers would simply drive through the exit gate without stopping at the booth to pay their parking fee. This would occur ordinarily on the night shifts when only one attendant was handling both lots; while he was busy at one lot, parkers would depart from the other lot without paying. Also, plaintiff's automatic ticket spitter turned out to be a "very temperamental instrument." During wet weather the machine could be counted on to jam or even to "short out" from rain water and run continuously so as to chew up the parking tickets "like confetti." On these occasions, the lot attendant on duty was confronted with the dual problem of trying to repair the machine and still handle incoming and outgoing customers.

Although aware of these conditions, plaintiff's representatives did little to correct them. The only significant action taken was the installation of some chains and small fencing at points where parkers had left without paying.[20] An obvious aid to the correcting of these problems would have been the employment by plaintiff of additional lot attendants. However, such action would have frustrated plaintiff's continuing desire to hold its labor costs as low as possible, and additional personnel were not employed by plaintiff until near the end of the contract period.[21] Defendant's representatives had also suggested that plaintiff should plant hedges around the parking lots to prevent cars from leaving the lots except by the established exits. However, plaintiff did not adopt this suggestion.[22]

19. As has been stated, plaintiff had adopted substantially the same daily report forms as those used by the prior concessionaire. Viewed simply as accounting forms, these daily report forms were reasonably complete and adequate. However, with respect to long-term parking particularly, difficulties arose from the manner in which these forms were filed out by parking lot personnel. An important corollary

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[20] A slight modification to the ticket spitter does not appear to have corrected the problem with the machine. Repairs thereto by the supplier were also unavailing.

[21] By reason of the contract provisions allowing to defendant 86.4 percent upwards to 95.1 percent of *gross* revenues, defendant would obviously lose by far the largest portion of any revenues lost through lax control of the lots assuming that plaintiff's operations had earned at least the minimum guarantee. By the same token, since plaintiff would have to pay all operating expenses, including wages of lot attendants, out of its relatively small percentage of gross revenues (a high of 13.6 percent to a low of 4.9 percent), it was of considerable importance to plaintiff that it keep such operating expenses at the lowest possible figure.

[22] It would seem doubtful, at best, whether newly-planted shrubbery would have a significant deterrent effect on a dishonest parker intent on "jumping the lot" without paying.

to these forms was a daily lot check of cars present and not previously tagged as COD, the result then being entered at a space denominated "Hold Over." When this figure was added to the number of courtesy, voided, and paid-for-tickets, the total should have reflected the total tickets issued for the particular day which total, in turn, should have balanced against the ticket issued figure as computed from the beginning and ending serial numbers of the ticket roll in use. Because the lot attendants did not consistently make a daily lot check, especially during bad weather, and because even when lot checks were made, the number of cars present might change during the checking period, it was difficult for the parking lot attendants to balance the form. In many instances, plaintiff's employees entered no figure in the space designated for "Hold Over" and the reports therefore could not be balanced. In other instances, they entered a "plugged" figure arrived at by a mathematical computation unrelated to the actual number of cars on the lot, and in this way caused the report to show a mere paper balance. On several occasions, defendant complained to plaintiff regarding what it considered to be deficiencies in the parking lot operations, particularly in failing to account for all tickets and in failing to make daily lot checks for the control of long-term parking. Then, on April 21, 1960, defendant wrote plaintiff alleging that its demands for improvement had been ignored, and that unless corrective action was taken by plaintiff immediately, defendant intended to terminate the contract. Conferences ensued between representatives for the parties as a result of which more complete and improved report forms and procedures were agreed upon and adopted by plaintiff. Even with these improved procedures, plaintiff was unable to account for all tickets issued as was true also of the other parking lot operators. However, the average revenue from long-term cars for June through September 1960 (the last 4 complete months of the contract) was

$2.22 per car as contrasted with an average revenue for the same period in 1959 of $1.80 per car.

20. At its home office in Buffalo, New York, plaintiff maintained standard and adequate accounting and statistical records on the parking lot operations both on a monthly and weekly basis. The source material for preparing these records was obtained from the daily ticket and concession reports and from an occasional test check of the tickets themselves. The weekly statistical reports were prepared at plaintiff's home office and served as a management guide for plaintiff's official, Mr. Sabatino. Whenever he noted a downward trend in the business, he would call upon either the field supervisor of parking lots or the local manager to check into the reasons for the decline and advise him. In his opinion, short-term parking was the producer of the basic revenue for most parking lots, and when he noted the sharp decline in this type of income during the latter part of 1958, he called upon his subordinates for an explanation. He learned of the new parking meter installation by defendant in October 1958, and, thereafter, he appears to have attributed plaintiff's basic difficulties to this single factor.

The record does not show whether he gave any study or attention to the long-term parking situation at the Airport.[23] An analysis of data available to him would have shown an unexplained downward trend in average revenue per long-term car without a corresponding downward trend in the number of long-term cars parked. Such analysis would also have shown an unduly large number of tickets not being accounted for by the parking lot attendants. These conditions indicated a need for managerial attention to long-term parking controls.

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[23] The defendant's letters of complaint written to plaintiff on March 24, 1958, and on December 29, 1959, were not called to his attention, and he had never seen them until just before the trial.

VII. PLAINTIFF'S FAILURE TO ACCOUNT FOR ALL PARKING TICKETS ISSUED

21. Plaintiff's operation of these parking lots was obviously a volume operation. During the three-year period of the contract, plaintiff collected in sums averaging 87 cents per car a total of over $930,000 from more than 1,100,000 automobiles parked. In such an operation it is customary for numbers of parking tickets to be unaccounted for under any practical and reasonable control system. The difficulty of accounting for all parking tickets is considerably aggravated in a "U-Park-It" system where, as here, the lot operator utilizes an automatic ticket spitter and a one-part parking ticket. Such a system leaves too much control in the hands of customers and parking lot employees, and carelessness or dishonesty on the part of either group becomes relatively difficult to detect.[24]

22. Out of a total of 1,137,834 parking tickets issued during the contract period, plaintiff was unable to account for 20,930 of such tickets. The number of such unaccounted-for tickets varied greatly from month to month. See Appendix 2. Plaintiff's management made no sustained efforts to ascertain the reasons for, or to correct the conditions giving rise to, this substantial number of lost tickets. The record herein shows that the reasons were manifold. An undertemined number of parkers left the lots without paying

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[24] For example, since it is inevitable in this type of volume operation that some tickets will not be accounted for, a dishonest parking lot attendant can collect a large parking fee from a long-term parker, pocket the cash, and destroy the parking ticket. Thus, a relatively few tickets so destroyed are merely part of many unaccounted for tickets, and the remote risk of detection may well be acceptable to a dishonest employee. There is no credible evidence in this record that employee pilfering took place. Nonetheless, an investigation of the possibilities by plaintiff's management was warranted because of the rising number of unaccounted-for tickets coupled with a decline in the average revenue per long-term car parked. The record discloses no such investigation.

their parking fees both by driving over the curbs and by running through the exit gates while the attendant was elsewhere. Some drivers entered the lot, took a ticket from the ticket spitter, and then left immediately without parking and without turning in the parking ticket. Some parkers lost their tickets or kept them as souvenirs. Probably the most prolific source of the unaccounted-for tickets was the ticket spitter on Lot 1 which had the defect of jamming or short-circuiting during wet weather. When this happened, the machine would frequently chew up and destroy tickets in quantities that could not be accurately ascertained.

23. As previously found, plaintiff's corrective actions appear to have consisted mainly of providing some additional chains and fencing to prevent cars from "jumping the curbs," and a few unproductive efforts were made to repair the defective ticket spitter. The rather obvious need for additional lot attendants and closer managerial supervision of them is indicated by two facts of record. First, Appendix 2 shows that, during the closing months of the contract period, the number of unaccounted-for ticket dropped substantially. Plaintiff had added by this time some additional employees, and in August 1960 an experienced and efficient lot attendant was made manager. From that time to the end of the contract, only 461 tickets were unaccounted for by plaintiff. Secondly, in August 1959 the defendant conducted a surveillance of the parking lots. At all times during that month, defendant had four men on duty checking plaintiff's employees and the license numbers of all cars entering and leaving the lots. This month-long surveillance by defendant proved that, in a volume operation of this kind, it is extremely difficult to account for all parking tickets issued because, during the surveillance month, 238 of the tickets issued could not be accounted for. See Appendix 2. However, it is significant that in the month preceding the surveillance 845 tickets were unaccounted for, and in the month following the surveillance, the number of unaccounted-for tickets in-

creased to 755. See Appendix 2. The inference is inescapable that the number of parking tickets unaccounted for is directly related to the number of employees available to check on the parking lot operations.

VIII. PLAINTIFF'S DAMAGES AND DEFENDANT'S COUNTERCLAIM

a. Plaintiff's Damages

24. Plaintiff has suffered loss as follows:

i. The loss of short-term cars (computed by using the first contract year as the base period) was 207,191 short-term cars in the second contract year (excluding the last quarter of 1958) and 300,306 short-term cars in the third contract year.

ii. Plaintiff's loss of short-term parking revenue in the second and third contract years (computed by multiplying the loss of short-term cars by 25¢) was $51,797.75 and $75,076.50, respectively.

iii. These losses properly must be adjusted by the factor of passenger use of the Airport, and the adjusted revenue loss for the second contract year is $56,058.80 and for the third contract year is $80,887.16.

iv. Adding the monthly revenue loss to the monthly income received and reported by plaintiff alters the amount of the monthly payments due to defendant under the concession contract and results in net monthly losses to plaintiff aggregating $45,177.27 during the second contract year (exclusive of the last quarter of 1958) and $34,713.31 during the third contract year.

v. The annual adjustment of the guaranteed minimum rental results in a final net loss to plaintiff of $92,167.16 comprised of a loss of $56,058.80 during the second contract year and $36,108.36 during the third contract year.

b. Defendant's Counterclaim

25. Defendant has asserted a counterclaim herein based upon plaintiff's failure to account for 20,930 parking tickets. Defendant claims that plaintiff's failure in this respect constituted a breach of the provisions of Article VI of the contract dealing with the operation and control of the parking lots. The average value of net tickets paid for was 87 cents per ticket, and by applying this average value to the total number of tickets unaccounted for, defendant's counterclaim amounts to $18,209.10.

26. Defendant's counterclaim is based upon the total of the unaccounted-for tickets, where as the record demonstrates that, even under admittedly adequate controls, it was not possible to account for all tickets issued in a volume operation such as this. Even during the month that defendant had the parking lots under complete and constant surveillance by its employees, 238 of the tickets issued for the month were missing. Adopting this as the optimum condtion, it would be reasonable to expect that .721 percent of issued tickets can not be accounted for even under adequate controls. Since during the contract period plaintiff issued 1,137,834 tickets, it could normally be expected that 8,204 of those tickets would be missing. Plaintiff could not account for 20,930 tickets, or 12,726 more than could normally be expected. Therefore, using the average ticket value of 87 cents, the value of missing tickets beyond that normally to be expected amounts to $11,071.62 to which figure must be applied the defendant's contract percentage of 86.4 percent. The resulting figure is $9,565.88 which is the maximum amount reasonably allowable as a counterclaim herein.

APPENDIX 1

Period	Cars Parked for 25¢ (Short-term) No. of Cars	Revenue	Other than 25¢ Cars (Long-term) No. of Cars	Revenue	Government Parking Meter Revenue
1957—October*	29,125	$7,281.25	7,399	$16,592.50	$2,099.00
November	32,914	8,228.50	8,494	18,697.53	1,899.00
December	35,890	8,972.50	6,900	18,518.50	1,636.00
1958—January	29,130	7,282.50	8,151	19,166.07	1,831.00
February	19,893	4,973.25	7,024	16,924.87	1,670.00
March	30,692	7,673.00	8,586	19,570.07	1,661.00
April	41,444	10,361.00	9,527	21,144.51	2,049.00
May	39,266	9,816.50	11,406	21,958.51	2,102.00
June	49,499	12,374.75	10,271	19,372.79	1,972.00
July	46,729	11,682.25	9,880	18,036.70	2,491.00
August	55,347	13,836.75	13,016	14,995.19	1,527.00
September	36,510	9,127.50	10,721	17,994.70	1,029.00
Totals	446,439	111,609.75	111,383	222,972.94	21,966.00
October	16,650	4,162.50	13,573	23,511.73	755.00
November	10,187	2,546.75	8,216	20,214.65	6,363.00
December	8,872	2,218.00	7,852	18,573.90	5,718.00
1959—January	9,744	2,436.00	10,495	20,513.05	5,838.00
February	10,325	2,581.25	8,486	19,596.75	6,610.00
March	13,821	3,455.25	10,274	20,518.65	7,241.00
April	14,903	3,725.75	11,289	19,546.15	8,556.00
May	16,261	4,065.25	11,477	19,396.95	9,054.00
June	18,615	4,653.75	10,791	18,749.10	9,633.20
July	19,221	4,805.25	9,770	16,650.25	9,228.11
August	22,959	5,739.75	10,441	20,151.05	10,427.78
September	15,470	3,867.50	10,878	20,313.10	8,928.95
Totals	177,028	44,257.00	123,542	237,735.33	88,353.04
October	12,948	3,237.00	12,461	23,632.45	8,467.30
November	11,228	2,807.00	10,721	21,928.85	8,136.19
December	10,276	2,569.00	11,317	20,279.95	7,721.73
1960—January	9,609	2,402.25	9,443	19,987.98	7,383.66
February	6,706	1,676.50	10,175	19,210.00	6,157.12
March	7,677	1,919.25	10,137	21,530.15	5,543.60
April	13,131	3,282.75	13,131	24,362.95	8,828.19
May	11,677	2,919.25	12,367	24,564.40	8,691.20
June	15,015	3,753.75	11,410	23,537.70	9,434.47
July	17,043	4,260.75	10,647	23,604.31	9,302.65
August	17,473	4,368.25	11,145	23,974.37	9,602.39
September	13,350	3,337.50	11,734	29,003.66	9,035.65
Totals	146,133	36,533.25	134,688	275,616.77	98,304.15
October*	1,543	385.75	2,085	3,981.50	....

* Partial month only

APPENDIX 2

Summary of Tickets Not Accounted for by Plaintiff

Period	Tickets issued	Tickets returned	Void and official tickets	Net tickets paid for	Tickets not accounted for
1957—October** ..	36,417	36,051	1,086	34,965	366
November ..	41,875	41,286	1,325	39,961	589
December ..	43,819	43,598	1,121	42,477	221
1958—January ...	37,646	37,438	1,199	36,239	208
February ..	27,222	26,802	1,027	25,775	420
March	39,612	39,260	1,411	37,849	352
April	50,995	50,827	1,531	49,296	168
May	49,805	49,631	1,660	47,971	174
June	59,845	59,333	1,778	57,555	512
July	57,161	55,563	1,722	53,931	1,508
August	68,435	65,212	2,419	62,793	3,223
September ..	43,856	43,241	1,922	41,319	615
October	28,422	29,245	1,714	27,531	*(823)
November ..	18,764	19,028	1,234	17,794	(264)
December ..	16,010	16,009	980	15,029	1
1959—January ...	18,693	18,138	1,019	17,119	555
February ..	19,203	18,908	1,156	17,752	295
March	24,088	23,536	1,396	22,140	552
April	26,412	25,411	1,596	23,815	1,001
May	27,731	26,683	1,554	25,129	1,048
June	30,184	28,888	1,610	27,278	1,296
July	29,487	28,642	1,512	27,130	845
August	33,006	32,768	1,287	31,481	238
September ..	26,315	25,560	1,352	24,208	755
October	25,409	24,414	1,218	23,196	995
November ..	19,854	18,946	932	18,014	908
December ..	21,003	20,065	901	19,164	938
1960—January ...	19,094	18,816	997	17,819	278
February ..	16,815	16,016	1,069	14,947	799
March	17,930	17,308	1,165	16,143	622
April	26,290	25,487	1,779	23,708	803
May	24,052	23,520	1,457	22,063	532
June	27,536	26,513	1,248	25,265	1,023
July	27,658	27,370	1,208	26,162	288
August	28,606	28,273	1,335	26,938	333
September ..	24,956	25,029	1,224	23,805	(73)
October** ..	3,628	3,427	199	3,228	201
	1,137,834	1,116,332	49,343	1,066,989	21,502
Less: Inventory at Oct. 5, 1960					572
Total tickets not accounted for					20,930

* Figures in parentheses represent excess of tickets returned over those issued and are deducted from total tickets not accounted for.

** Partial month only.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is therefore dismissed. The court further concludes that defendant is entitled to recover on its counterclaim in the sum of $9,565.88, and judgment is entered for defendant in that amount.